

# Child and Family Services Update

Thursday, February 21, 2002

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## Knowing You Are Concerned, I Want To Provide This Legislative Update

*By Richard Anderson*

**The best news first.** I have received many compliments during the session on your work and the positive changes that have been observed by or reported to legislators. This is not an exaggeration. The comments have been, "The division is really making positive changes," "We don't want to hurt the direction the division is going," "We don't want to send a negative message to staff as they are doing a wonderful job," "I think the division is moving in a good direction and we don't want to get in the way of the positive changes," and from one of the leaders in the legislature who viewed our Practice Principles and Skills Sets, "I think you are moving in the right direction." I have invited many of the members of the legislature to come and see who we are today and where we are going. I think that more legislators will accept our invitation. Feel free to invite your Representative or Senator to come visit us. Rep. David Litvak, Democrat-District 27 in Salt Lake County, went on a Qualitative Case Review last fall. He is the first to take us up on our offer. His understanding of what we are doing has added to his combined advocacy for our families, our children, and us--as Child and Family Services staff and administration.

There are several bills in this legislative session that will impact the work we do with children and families. Adam did a great job of summarizing the bills for you in our last Update. Most legislators have been very willing to work with us on our concerns when a bill may have had unintended consequences or where all the required changes may have not been feasible to implement.

**Now, to your major concern.** I know from your comments and emails that the one bill that has most of us concerned is House Bill 28, sponsored by Rep. Wayne A. Harper. This bill has caused quite a stir in our division, and rightfully so. It is for this reason that I want to provide some information about the content of the bill that may be helpful to you. Just so you know, the bill has passed the House and is on its third reading in the Senate when the Legislature reconvenes. The last Senate vote on the bill was 18 for, 6 against, and 5 abstaining or absent. It will be up again for the final vote next week.

Since the bill is very brief, and I realize that many of you may have not had time to read it, I will quote it here. The italics and underlined portions are the changes to the statute. The bolded and capitalized portion is the latest amendment.

### **62A-4a-410. Immunity from liability.**

- (1) Any person, official, or institution participating in good faith in making a report, taking photographs or X-rays, assisting an investigator from the division, serving as a member of a child protection team, or taking a child into protective custody pursuant to this

part, is immune from any liability, civil or criminal, that otherwise might result by reasons of those actions.

(2) This section does not provide immunity with respect to acts or omissions of a governmental employee if it is established **THROUGH AN ADMINISTRATIVE DUE PROCESS HEARING, AS PROVIDED BY SECTION 67-19a-406, OR A DISTRICT COURT PROCEEDING** that:

- (a) the employee acted or failed to act under subsection (1) through fraud or malice, in accordance with subsections 63-30-4(3)(b) or (4); or
- (b) in a judicial or administrative proceeding the employee intentionally or knowingly gave, upon a lawful oath or in any form allowed by law as a substitute for oath, false testimony material to the issue or matter of inquiry under Subsection (1).

At face value, you may see why legislators vote for the bill. Most people would need to be in our shoes to see the flaw in promoting such an attitude or to realize that singling out one group of state employees on this issue is not appropriate. I believe that Rep. Harper has good intentions. The concern for us is that we have no evidence of a problem that warrants this kind of a bill. We all realize that our decisions and actions are crucial, but so are the decisions of many other entities. It will really be interesting, or should I say tragic, if the bill passes and there is an identical situation that comes up in another state agency and the immunity coverage is different for the two state employees. If the bill is good for us, and those we serve, it must be good for any governmental employee and those they serve. We were offered the opportunity to present modifications to the wording in the bill so that the negative message was not there. We made the determination that we could not support the basic approach and we graciously declined.

There is another bill that has surfaced that attempts to make the law more fairly applied. Rep. Matt Throckmorton has filed House Bill 138 that makes the requirements the same for all state employees. If such a bill is needed, this one is fair.

Some of us may not fully understand why we have governmental immunity. Here is a summary of Qualified Immunity gleaned from a filing on a court hearing this past year as prepared by the Office of the Attorneys General.

“Qualified immunity allows for governmental action while at the same time protecting clearly established rights of the individual. ‘[W]here an official’s duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken ‘with independence and without fear of consequences.’ *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1981) (quoting *Pierson v. Ray*, U.S. 547, 554 (1967)). The qualified immunity doctrine protects the exercise of discretion in an effort to promote the ‘public interest in encouraging the vigorous exercise of official authority.’ Qualified immunity allows for reasonable mistakes in judgment. This accommodation for reasonable error exists because ‘officials should not err always on the side of caution’ because they fear being sued. *Davis v. Scherer*, 468 U.S. 183, 196 (1984). The qualified immunity standard ‘gives ample room for mistaken judgments’ by protecting ‘all but the plainly incompetent or those who knowingly violate the law.’ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).”

We all experience the fear of the consequences of our decisions as being part of our work. We also know that we have to weigh the use of official authority. I have testified in legislative hearings that without support of appropriate immunity, no one would readily take our jobs or jobs in other agencies that require our kind of decision-making. Some legislators really do understand how devastating it is to us to not receive more understanding and better support. Others just do not see the problem as we see it. I don't think any of this was intended to do what it is doing to us in the sense of making us feel singled out and accused. It is just the way it has turned out.

Now, just so you know, the bill does not take away immunity. It merely reinforces when immunity is not given. I believe that none of us would support such disregard for honesty, law, and justice to violate the intent of the bill. So, for the most part, we will be fine.

In the future, I hope that anyone who believes we have a problem that needs to be addressed by changing the law will come and see the evidence, work with us to make any changes, and provide a partnership for improving our work. We are open to improvements.

NOTE: I received a call from Fred Van Der Veur, Executive Director of UPEA, while I was drafting this message to you. He said he was receiving calls and email messages from our staff concerned that UPEA was supporting House Bill 28. He wanted me to make sure that you are aware that they are opposed to the bill. Also, I know that Fred has been working on changes to the bill to modify its impact if it does pass. Fred wanted you to also know that the capitalized portion, the latest amendment, was actually a proposal from UPEA to try to modify the bill.